IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STIERS, INC., a Washington corporation,

Respondent,

v.

JARA, INC., an Oregon corporation,

Appellant.

No. 38113-3-II

UNPUBLISHED OPINION

Houghton, P.J. — Landlord, Jara, Inc., an Oregon corporation, appeals a trial court order lowering the rent of its tenant, Stiers, Inc., a Washington corporation. Jara argues that the trial court improperly determined the appropriate market rental rate, that substantial evidence did not support its findings, and that it abused its discretion by examining witnesses too frequently. We affirm.

FACTS

James Stiers (Stiers) operates the Thunder Car Wash in the Mill Plain Center in Clark County. Stiers's former corporation and predecessor in interest had been a tenant of the Center since 1992.[1] At the time the Center opened, the Mill Plain area of Clark County was not well developed, and the Center was a new concept. From 1990 until 1996, Stiers managed the Center and its tenants for the previous landlord.

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[1] James Stiers was president of both corporations and the change in ownership does not affect this case. The landlord also changed, but neither party disputes the trial court's finding that both parties are the successors in interest to the original parties.

Primarily, the parties dispute what the appropriate rent should be for Stiers's Thunder Car Wash business. The lease, executed in 1992, had an 84-month term at $14 per square foot.[2] On November 27, 1995, the parties extended the lease expiration date until July 1, 2002, by an addendum. By June 30, 2002, Stiers paid $19.75 per square foot. The lease contained an option to renew for two additional five-year periods, with the price determined by "the then market rental rate." Clerk's Papers (CP) at 42.

In 2002, at the end of the initial term, the parties arbitrated the matter and an arbitrator set the rent at $21.75 per square foot beginning July 1, 2002. By the end of the first five-year renewal on June 30, 2007, Stiers paid $23.06 per square foot. On July 1, 2007, the day after the five-year period ended, Jara raised the rent to $30.00 per square foot.[3]

On July 27, 2007, by an amended complaint, Stiers sued Jara, alleging breach of contract and seeking a declaratory judgment. He moved for summary judgment. Jara cross-moved for summary judgment, asking that the rent "be the fair market rental value on July 1, 2007."[4] CP at 78. The trial court denied both motions and held a bench trial on June 2, 2008.

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[2] This amount and those that follow represent a base rate rent. The rent Stiers actually paid is higher, as Jara charges all tenants an additional fee to maintain common areas. The parties do not dispute these fees and, instead, focus on the base rate amount. These additional fees explain why the rental rates seem to increase during different contract periods. That is, the base rate stays the same until the end of a term in the lease, but the fees increase gradually. The increases appear to be tied to the Consumer Price Index.

[3] Stiers paid this rent, under protest, until May 2008.

[4] At trial, Stiers sought to apply collateral estoppel from the arbitrator's 2002 award and Jara opposed it. On appeal, Jara has asked us to review the trial court's order denying its cross-motion for summary judgment, arguing that the 2002 rent decided by arbitration should have preclusive effects. We address this argument further below.

At the bench trial, the court heard from James Stiers, Charles Kaady, Dean Meyer, and Steven Mikulic. Stiers, the plaintiff's only witness, testified that when he managed property for Jara's predecessor in interest, he wrote the renewal language into the leases. He explained that the renewal clause regarding the market rate referred to the base rent charged to other Center tenants at the time the tenant exercised the option. Although Jara disputes the finding, the trial court found that numerous tenants had the same language in their leases. Stiers testified that as anchor tenants, Thunder Car Wash and a gym, paid less rent than others in the Center.

Kaady, who owns 15 car washes in the Vancouver and Portland areas, testified that exposure to traffic, location, and site layout all factor into the rental price of a property. He testified that at his leased car washes, the rent ranges from $22 to $61 per square foot. But he claimed his leased property in Clark County rents for $25 per square foot, following his $500,000 renovation of the property.

Meyer testified as a commercial real estate appraiser and provided background information for the trial court about leases and the Clark County market. In his formal appraisal of Thunder Car Wash, he compared it with other car washes in the Vancouver and Portland areas. He concluded that $30 per square foot, plus fees, would be an appropriate rate for the Thunder Car Wash.

Mikulic, Jara's current manager and lease renewal agent, testified that appraisals such as the one Meyer provided are important in the commercial lease market. On cross-examination, he said that he did not think he set the $30 per square foot figure for Meyer to reach, but it pleased him to discover the two ultimately agreed on a similar figure.

On direct and cross-examination, the trial court invoked ER 614(b) and extensively questioned each of the parties' witnesses. Neither party objected.[5]

The trial court reviewed the evidence the parties presented, including a rent record from Jara showing the amounts of rent the Center tenants paid. The trial court concluded that the language in section 1.07 regarding the lease market rent rate was broad and did not clearly support either party's interpretation. The trial court interpreted the clause as "rents being paid by comparable businesses in Clark County in comparable circumstances." CP at 145. It averaged the rents paid by similar car washes in Clark County with the rents paid by other Center tenants and set the rent at $20.02 per square foot.

The trial court then calculated the difference between $20.02 per month and $30 per month from July 2007 to May 2008, and it awarded Stiers a $17,107.42 principal judgment, $7,672.50 in attorney fees, and $230.00 in costs for a total of $25,009.92. Jara appeals.

ANALYSIS

Substantial Evidence - Rent

Jara first contends that substantial evidence does not support the trial court's rulings. It argues that whether Thunder Car Wash was an anchor tenant is irrelevant, that the market rate language of the lease was clear, and that the clause "the then market rental rate" did not mean the average rent paid by similar businesses in the area and other Center tenants.

We review findings of fact for substantial evidence, which is a quantum of evidence sufficient to persuade a rational, fair-minded person of the premise's truth. *Wenatchee Sportsmen*

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[5] Jara claims to have objected to the procedure, but the record shows both parties remained silent when the trial court invoked ER 614.

Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). We do not substitute our judgment for the trial court's, even if it could be resolved differently. *Merrick v. Peterson*, 25 Wn. App. 248, 252, 606 P.2d 700 (1980). We defer to the fact finder on issues of conflicting evidence, credibility of witnesses, and persuasiveness of the evidence. *City of University Place v. McGuire*, 144 Wn.2d 640, 652-53, 30 P.3d 453 (2001).

Jara argues that the trial court improperly concluded that Thunder Car Wash was an anchor tenant and that substantial evidence does not support such a finding. At trial, Stiers sought to establish that he should and did pay less rent because, as an anchor tenant, he brings business into the Center. The trial court agreed and entered a finding that Thunder Car Wash was an anchor tenant. But on appeal, the parties agree that this finding was not relevant because this case does not turn on whether Thunder Car Wash was an anchor tenant. Nevertheless, where irrelevant findings are neither favorable nor unfavorable to the complaining party, any error is harmless. *Ottgen v. Clover Park Technical Coll.*, 84 Wn. App. 214, 218 n.2, 928 P.2d 1119 (1996). Jara's argument fails.

Next, Jara argues that the trial court improperly found "the then market rental rate" lease provision unclear and interpreted it incorrectly. Section 1.07 of the lease contains "the then market rental rate" clause and provides:

> Lease Term: Eighty-four (84) months (subject to commencement date delay as provided in Article Two) with an option to extend at the then market rental rate for an additional two option periods of five (5) years each.

CP at 121. The trial court interpreted the clause to mean the average rental rate paid by all Center tenants ($15.32) and the average paid by comparable car washes in Clark County ($24.72) and then averaged the two numbers to arrive at a mid-point of $20.02 per square foot.

Substantial evidence supports the trial court's finding that Stiers owes $20.02 per square foot under his renewal on the lease. Jara's records show that in 2007, the average rent paid by automotive tenants was $15.31, and the average paid by service and retail tenants was $15.33. Kaady testified that he pays from $22 to $61 per square foot. Meyer testified that commercial leases in the area range in rates from $14 to $30 per square foot and that the amount of money a tenant puts into the property affects the price of rent. Mikulic, Jara's property manager, testified that the lease contained no formula and suggested that Stiers's lease provisions were not well defined and contained "gray areas." II Report of Proceeding at 212. The trial court explained that it reached its decision by balancing the figures from varying testimony. This testimony provides a substantial evidence basis for the trial court's challenged findings.[6] Jara's argument fails.

Hearsay

Jara next contends that the trial court abused its discretion when it denied two hearsay objections. Jara asserts that the trial court should not have allowed Stiers to testify regarding events at the time he worked for Jara's predecessor in interest.

We review the trial court's evidentiary rulings for abuse of discretion. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007). A trial court abuses its discretion when

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[6] At trial, Jara objected that Stiers's testimony with respect to the lease contents and the reasons for including certain terms was parol evidence. The trial court overruled the objection and explained that it would limit its examination of the lease to its plain meaning. The record suggests the trial court acted properly and limited its inquiry accordingly.

it bases its decision on untenable or unreasonable grounds. *Qwest*, 161 Wn.2d at 369. Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c).

Jara objected to Stiers testifying as to the contents of other leases. The trial court concluded that because he was the drafter of his lease and had personal knowledge of the contents of other leases, his testimony regarding the same leases would not be hearsay. Notwithstanding the trial court's decision regarding Stiers's personal knowledge, his counsel did not offer the testimony for the truth of the matter asserted in the other leases. That is, his counsel did not offer his testimony that the other leases contained the same lease extension term as his own lease to prove that the terms in the other leases actually operated to extend the leases but merely that the other leases had the same language. Accordingly, the trial court did not abuse its discretion by overruling the hearsay objection and Jara's argument fails.

ER 614(b)

Jara next contends that it did not receive a fair trial because the trial court improperly injected itself into the proceedings. Under ER 614(b), the trial court may call its own witnesses or ask questions of other witnesses. Either party may object. ER 614(c). In the case of a jury trial, a party may wait until the next time the jury is out of the room to do so. ER 614(c). Here, neither party objected, despite the trial court's invitations to object. A party must preserve evidentiary objections for appellate review. *See* RAP 2.5(a). Reviewing the record in light of ER 614, even if Jara had objected, the trial court would have been correct to overrule the objection. Regardless, Jara failed to object and we do not consider the matter further.[7]

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[7] To support its argument, Jara relies on *State v. Eisner*, where our Supreme Court overturned a first degree rape of a child conviction after the trial court intervened excessively. 95 Wn.2d 458,

Summary Judgment

Jara next contends the trial court improperly denied its cross motion for summary judgment. It argues that the trial court should have applied collateral estoppel principles to the arbitrator's 2002 findings. We do not review an order denying summary judgment based on the presence of material or disputed facts after the trial court has held a trial on the merits. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993). Jara must base its appeal on the evidence presented at trial. *Adcox*, 123 Wn.2d at 35 n.9. Therefore, Jara's argument fails.

Attorney Fees

Jara finally contends that the trial court abused its discretion when it awarded Stiers attorney fees. Section 12.1 of the lease allows for an attorney fee award. As Stiers prevailed, the trial court properly awarded attorney fees and costs.

Stiers requests fees on appeal. We award reasonable attorney fees and costs on appeal, upon his compliance with RAP 18.1.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

We concur:

463-64, 626 P.2d 10 (1981). But *Eisner* analyzed judicial intervention in the context of a criminal jury trial, and its reasoning is inapposite to Jara's commercial lease bench trial.

Hunt, J.

Quinn-Brintnall, J.